

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BIODIVERSITY CONSERVATION ALLIANCE  
215 South Third Street, Suite 114  
Laramie, WY 82070,

CENTER FOR BIOLOGICAL DIVERSITY  
1333 North Oracle Road  
Tucson, AZ 85705

Civ. No. 1:04-CV-02026 (GK)

FOREST GUARDIANS  
312 Montezuma Ave., Suite A  
Santa Fe, NM 87501,

CENTER FOR NATIVE ECOSYSTEMS  
1536 Wynkoop, Suite 301  
Denver, CO 80202,

UTAH ENVIRONMENTAL CONGRESS  
1817 So. Main St, Suite 10  
Salt Lake City, Utah 84115

and

JEREMY NICHOLS  
369 N. Hodgeman Street  
Laramie, WY 82072,

Plaintiffs,

vs.

GALE NORTON  
Secretary of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

and

STEVEN WILLIAMS  
Director of the U.S. Fish and Wildlife Service  
1849 C Street, N.W.

Washington, D.C. 20240

Defendants.

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FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. INTRODUCTION

1. Plaintiffs BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR BIOLOGICAL DIVERSITY, FOREST GUARDIANS, CENTER FOR NATIVE ECOSYSTEMS, UTAH ENVIRONMENTAL CONGRESS and JEREMY NICHOLS challenge the failure of the Secretary of the Interior, GALE NORTON, and Director of the United States Fish and Wildlife Service (“FWS” or the “agency”), STEVEN WILLIAMS, to perform mandatory duties required by section 4(b)(3)(A) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(b)(3)(A), concerning the Plaintiffs’ petitions to list the Dakota Skipper butterfly (*Hesperia dacotae*), Gunnison’s Prairie Dog (*Cynomys gunnisoni*), Black Hills mountainsnail (*Oreohelix cooperi*), and Uinta mountainsnail (*Oreohelix eurekensis uinta*) as endangered or threatened species. Defendants have violated their mandatory duty under the ESA to make preliminary findings as to whether Plaintiffs’ petitions to list the Dakota Skipper, Gunnison’s Prairie Dog, Black Hills mountainsnail, and Uinta mountainsnail under the ESA present substantial scientific or commercial information indicating that the petitioned actions may be warranted. See 16 U.S.C. § 1533(b)(3)(A).

## II. PARTIES

2. Plaintiff BIODIVERSITY CONSERVATION ALLIANCE is a Laramie, Wyoming-based nonprofit conservation organization dedicated to protecting and restoring native species of plants and animals throughout the Rocky Mountain Region and the northern Great Plains.

Biodiversity Conservation Alliance staff and members work to protect the habitats of the Dakota Skipper, Black Hills mountainsnail, and Uinta Mountainsnail and conduct extensive research on the Dakota Skipper, Black Hills mountainsnail, and Uinta mountainsnail and their respective habitats. Staff and members of Biodiversity Conservation Alliance frequently recreate in the habitat areas of the Dakota Skipper, Black Hills mountainsnail, and Uinta mountainsnail. These staff and members of Biodiversity Conservation Alliance observe and attempt to observe the Dakota Skipper, Black Hills mountainsnail, and Uinta mountainsnail. These staff and members of Biodiversity Conservation Alliance will continue to do the above described activities in the future on a regular basis. Staff and members seek to ensure that the Dakota Skipper, Black Hills mountainsnail, and Uinta mountainsnail can each exist in their natural habitat. Thus, staff and members work to compel those agencies charged with protecting endangered and threatened species to follow the laws designed to protect those species, which included drafting the petition to list the Dakota Skipper and Black Hills mountainsnail under the ESA.

3. The above-described scientific, educational, aesthetic, recreational, spiritual, procedural and conservation interests of Biodiversity Conservation Alliance, its staff and members, have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

4. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (CBD) is a non-profit corporation

with its headquarters in Tucson, Arizona. Striving to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and by extension for the spiritual welfare of generations to come, CBD is actively involved in species and habitat protection advocacy throughout the United States. CBD's members and staff include local residents with aesthetic, recreational, educational, scientific research, moral, and spiritual interests in both the Dakota Skipper and the Uinta mountainsnail, and in their respective habitats. These individuals frequently recreate in the habitat area of the Dakota Skipper and Uinta mountainsnail. They observe and attempt to observe the Dakota Skipper and Uinta mountainsnail. To ensure that the Dakota Skipper and Uinta mountainsnail can continue to exist in their natural habitats the CBD, its members, and staff have participated in efforts to protect and preserve the habitat essential to the survival of the Dakota Skipper and Uinta mountainsnail. CBD, its members and staff will continue to do the above described activities in the future on a regular basis

5. The above-described educational, scientific, aesthetic, recreational, spiritual, procedural and conservation interests of the Center, its staff and members, have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

6. Plaintiff FOREST GUARDIANS is a non-profit environmental organization committed to protecting flora, fauna, natural processes, and native habitats in the greater American southwest, including New Mexico, Arizona, Colorado and Utah. Forest Guardians prepared the petition requesting that the FWS list the Gunnison's Prairie Dog as threatened or endangered under the ESA. Forest Guardians, its staff, and members derive scientific, aesthetic, and spiritual benefit from the Gunnison's Prairie Dog's existence in the wild and from the ecosystem which

the Gunnison's Prairie Dog creates and sustains. Forest Guardians' staff and members regularly recreate in the habitat of the Gunnison's Prairie Dog. Forest Guardians, its staff and members will continue to do the above described activities in the future on a regular basis.

7. The above described educational, scientific, aesthetic, recreational, spiritual, procedural and conservation interests of Forest Guardians, its staff and members, have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

8. Plaintiff CENTER FOR NATIVE ECOSYSTEMS is a Denver, Colorado-based non-profit, science-based conservation organization dedicated to protecting and recovering native and naturally functioning ecosystems in the Rocky Mountain Region and Great Plains, which includes the area within the range of the Dakota Skipper Butterfly, Gunnison's Prairie Dog Black Hills Mountainsnail and the Uinta Mountainsnail. The Center for Native Ecosystems, its staff, and members derive scientific, aesthetic, and spiritual benefit from the existence of the Dakota Skipper Butterfly, Gunnison's Prairie Dog, Black Hills Mountainsnail and Uinta mountainsnail in the wild and from the ecosystems upon which the Dakota Skipper Butterfly, Gunnison's Prairie Dog, Black Hills Mountainsnail and Uinta Mountainsnail depend and influence. Center for Native Ecosystems staff and members regularly recreate in the habitat area, observe and/or attempt to observe the Dakota Skipper Butterfly, Gunnison's Prairie Dog, Black Hills Mountainsnail and Uinta mountainsnail. The Center for Native Ecosystems, its staff and members will continue to do the above described activities in the future on a regular basis. The above-described educational, scientific, aesthetic, recreational, spiritual, procedural and conservation interests of the Center for Native Ecosystems, its staff and members, have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and

irreparably injured by Defendants' inaction.

9. Plaintiff UTAH ENVIRONMENTAL CONGRESS ("UEC") is a Salt Lake City, Utah based conservation organization whose mission is: Reclaiming and acting upon our ancestral responsibility to the land, the Utah Environmental Congress brings people together to engage in genuine protection of living forest systems that provide islands of refuge in Utah's desert country. UEC, its staff, and members derive scientific, aesthetic, and spiritual benefit from the existence of the Uinta mountainsnail in the wild and from the ecosystem upon which the Uinta Mountainsnail depends and influences. UEC staff and members regularly recreate in the habitat of and observe and/or attempt to observe the Uinta mountainsnail. UEC, its staff and members will continue to do the above described activities in the future on a regular basis. The above-described educational, scientific, aesthetic, recreational, spiritual, procedural and conservation interests of UEC, its staff and members, have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

10. Plaintiff JEREMY NICHOLS is a Laramie, Wyoming resident who has worked to protect and restore the natural values of the Rocky Mountain Region and the northern Great Plains for over three years. Mr. Nichols prepared the petitions to list the Dakota Skipper and Black Hills mountainsnail and actively monitors the status of the Dakota Skipper, Black Hills mountainsnail, Uinta mountainsnail and their respective habitats. Mr. Nichols and his family use and enjoy the tallgrass and mixed grass prairies of the northern Great Plains, the Black Hills of South Dakota and Wyoming, and the Ashley National Forest of northeastern Utah primarily for hiking, camping, and viewing wildlife, including the Dakota Skipper, Black Hills mountainsnail, and Uinta mountainsnail, and they have expressed numerous concerns over the imperiled species of

these areas. Mr. Nichols will continue to do the above described activities in the future on a regular basis. Mr. Nichols has an educational, scientific, aesthetic, recreational, procedural and conservation interest in the survival and recovery of the Dakota Skipper, Black Hills mountainsnail, and Uinta mountainsnail. These interests of Mr. Nichols have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

11. Defendant GALE NORTON is sued in her official capacity as the Secretary of the Interior (Secretary). The Secretary is the federal official who bears ultimate responsibility for implementation of the ESA, including making determinations on petitions to list species pursuant to ESA § 4(b)(3)(A).

12. Defendant STEVEN WILLIAMS is sued in his official capacity as the Director of the United States Fish and Wildlife Service, which is a part of the Department of Interior. Mr. Williams is charged with administering the ESA including review and approval of proposed listing decisions for endangered and threatened species.

### III. JURISDICTION AND VENUE

13. This is an ESA citizen suit in which Plaintiffs allege that Defendants, who are federal officers, violated a mandatory duty under Section 4 of the ESA. As explained below, notice of intent to file this ESA citizen suit was properly given. This suit also includes alternative claims under the Administrative Procedures Act. Thus, this Court has jurisdiction over this matter pursuant to 16 U.S.C. § 1540(g) (citizen suits under the ESA) and 28 U.S.C. § 1331.

14. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgments).

15. A substantial part of the events and omissions giving rise to the claims in this case as well as the violations of the mandatory duties occurred in the District of Columbia. Furthermore, Defendants Gale Norton and Steven Williams reside in the District of Columbia. Thus, venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(1) and (2).

#### IV. FACTS

##### A. REGULATORY STRUCTURE

16. The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA) seeks “to provide a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b).

17. An essential component of this program is known as the listing process, as the protections contained in the ESA apply only to those species that are listed as endangered or threatened.

18. To achieve its goals, the ESA provides that interested persons can begin the listing process by filing a petition with FWS to list a species or a distinct population segment of a species as endangered or threatened. 16 U.S.C. § 1533(b)(3)(A) (ESA § 4(b)(3)(A)).

19. Upon receipt of such a petition to list a species, FWS must review the petition and within ninety (90) days, “to the maximum extent practicable,” make a finding as to whether that petition presents “substantial information” indicating that the petitioned listing may be warranted. 16 U.S.C. § 1533(b)(3)(A).

20. In the event that this substantial information finding is affirmative, that is that the petition does present substantial information that a listing rule may be warranted, FWS shall issue a second finding, commonly referred to as the “12-month finding,” within twelve (12) months of



the date of receipt of the petition. 16 U.S.C. § 1533(b)(3)(B). In the 12-month finding FWS must reach one of three possible conclusions: that (1) the petitioned action is warranted; (2) the petitioned action is warranted but presently precluded by other pending proposals for listing species; or (3) the petitioned action is not warranted. Id. Should FWS conclude that the petitioned action is warranted but precluded, it must publish this finding in the Federal Register “together with a description and evaluation of the reasons and data on which the finding is based.” 16 U.S.C. § 1533(b)(3)(B)(iii). Moreover, this explanation must also demonstrate that “expeditious progress” is being made both in extending ESA protection to qualified species and in removing ESA protection from species which no longer require it. Id.

21. Although the ESA recognizes that it will not always be possible for FWS to complete the substantial information finding within ninety days, ESA § 4(b)(3)(A), the statute clearly sets a maximum limit on the amount of time that FWS can take to make this substantial information finding. The deadline for the 12-month finding is twelve months from the date that the listing petition was received, without exception. See ESA § 4(b)(3)(B), 16 U.S.C. § 1533(b)(3)(B). Thus, FWS must complete the substantial information finding for a listing petition within one year of receiving that petition, as the substantial information finding is a prerequisite step in the 12-month finding process. See American Lands Alliance v. Norton, 242 F.Supp.2d 1, 8, fn. 7 (D.D.C. 2003) (citing Biological Diversity Foundation v. Babbitt, 63 F.Supp.2d 31 (D.D.C. 1999)). See also Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1178 (9th Cir. 2002).

22. FWS routinely fails to issue substantial information findings on ESA listing petitions, including ESA listing petitions filed by Plaintiffs, even after the 12-month finding deadline has passed.

23. The petition process is not the only means by which a species can be listed under the ESA. On its own initiative, FWS can undertake a study of whether a species should be listed as endangered or threatened. See 16 U.S.C. § 1533(a)(1). When this occurs, FWS regulations provide that if the agency determines that listing of the species “may be warranted, but that the available evidence is not sufficiently definitive,” the agency may designate the species as a candidate for a future listing. 50 C.F.R. § 424.15(a). Once such a designation is made, neither the ESA nor FWS’s implementing regulations require additional action with regard to the candidate species. FWS regulations merely provide that the agency may update the status of such species “from time to time.” 50 C.F.R. § 424.15(b).

24. This lack of regulatory “teeth” prevents the “candidate species” designation from serving as a legal substitute for the publication of a valid substantial information finding. See American Lands Alliance v. Norton, 242 F. Supp. 2d 1, 9-10 (D.D.C. 2003) (holding that designation as a candidate species “is not the ‘functional and substantive equivalent’ of a petition process’s substantial information finding,” because the candidate species designation does not result in the same outcome – the 12-month finding).

25. Since the enactment of the ESA in 1973, 108 U.S. species are known to have become extinct. Twenty-four (24) of those species have gone extinct while waiting on the federal candidate species list, or similar lists. In all, ESA listing delays have contributed to the irreversible loss of eighty-three (83) species.

## B. THE DAKOTA SKIPPER LISTING PETITION

26. The Dakota Skipper (“Dakota Skipper,” or the “skipper”) is a small to medium-sized

butterfly with wings that vary in color from yellow-orange to brown. Its name derives from its unique rapid, skipping flight. It is a rare and critically imperiled butterfly species native to tallgrass and mixed grass prairie habitats in the northern Great Plains. The Dakota Skipper and its habitat have been, and are being, severely adversely affected by many human activities. The human activities that threaten the continued existence of the Dakota Skipper include conversion of the skipper's habitat to agricultural or other uses, and degradation of the skipper's habitat through pesticide and herbicide application, excessive livestock grazing, nonnative plant invasion, and haying.

27. The Dakota Skipper serves a valuable role as an indicator species. Healthy skipper populations are one of the best indicators of both mixed grass and tallgrass prairie ecosystem health. Conversely, rapid declines in Dakota Skipper populations can provide notice of an approaching environmental problem, aiding in the avoidance of further ecological damage.

28. Historically, Dakota Skippers were contiguously distributed throughout the tallgrass and mixed grass prairie in Illinois, Iowa, Minnesota, the Dakotas, Manitoba, Saskatchewan, and possibly eastern Montana. However, the skipper has lost much of its former range and is now primarily found only in western Minnesota, the eastern half of North Dakota, and northeastern South Dakota. Land ownership in the Dakota Skipper's current range is split roughly evenly, with public and private landowners each accounting for about half of the land that now constitutes the skipper's habitat.

29. Currently, only 150 populations of Dakota Skipper are extant or presumed extant. Of these, eighty-three populations face at least a 20% likelihood of extinction within the next twenty years, while the status of an additional thirty-seven sites is as yet undetermined.

30. Habitat conversion and degradation are the two chief problems confronting the remaining

Dakota Skipper populations. While these populations tend to be located on land that is unsuitable for agricultural production, conversion of skipper habitat to agricultural use remains a threat to a dozen skipper populations in North Dakota. Meanwhile, conversion of Dakota Skipper habitat to mining or other uses threatens a handful of additional populations.

31. Habitat degradation causes tallgrass and mixed grass prairies to support fewer native plant species, especially the nectar plants that are an essential source of food for the Dakota Skipper. Habitat degradation affecting skipper populations is primarily caused by nonnative plant invasion, pesticide or herbicide application, excessive livestock grazing, and certain fire management activities. Additionally, haying or mowing may degrade Dakota Skipper habitat if performed before or during the skipper's flight period.

32. In 1975, in response to the mounting threats to the Dakota Skipper's continued existence, FWS designated the skipper a candidate species. 40 Fed. Reg. 12,691. Periodically FWS briefly reviews the status of all ESA candidate species, including the Dakota Skipper, in a publication called a Candidate Notice of Review. For example, in the last Candidate Notice of Review, which appeared in the Federal Register on May 4, 2004, FWS devoted a single paragraph to the status of the skipper. See 69 Fed. Reg. 24,876, 24,891.

33. Plaintiffs BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR BIOLOGICAL DIVERSITY, and JEREMY NICHOLS, among others, submitted a petition to list the Dakota Skipper as endangered or threatened on May 6, 2003. Defendants received this petition to list the Dakota Skipper on or about May 12, 2003, more than one year ago.

34. On July 29, 2003, FWS sent a letter to the petitioners acknowledging receipt of the petition to list the Dakota Skipper. In this acknowledgment letter, FWS indicated that, because the skipper is already a candidate species, FWS was treating the skipper as having been subject

to both a positive substantial information finding and a “warranted but precluded” 12-month finding, with the Candidate Notice of Review constituting publication of these required findings.

35. The American Lands Alliance decision determined that a Candidate Notice of Review does not constitute a valid substantial information finding, American Land Alliance, 242 F. Supp. 2d at 9-10. However, even if the Candidate Notice of Review for the Dakota Skipper were to serve as a valid substantial information finding, it does not constitute a valid 12-month warranted but precluded finding, as Candidate Notices of Review do not provide the level of justification sufficient to satisfy the standard prescribed in section 4(b)(3)(B)(iii) of the ESA for warranted but precluded 12-month findings. See Center for Biological Diversity v. Norton, 254 F.3d 833, 839 (9th Cir. 2001) (Candidate Notice of Review does not provide the level of justification that the ESA requires for a 12-month finding of warranted but precluded); American Lands Alliance, 242 F. Supp. 2d at 18 (same).

36. By letter dated August 14, 2003, Plaintiffs BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR NATIVE ECOSYSTEMS, and JEREMY NICHOLS provided Defendants with written notice of their intent to sue for Defendants’ failure to issue a substantial information finding on the Dakota Skipper listing petition, a violation of section 4 of the ESA. See 16 U.S.C. § 1540(g)(2)(C). More than sixty days have passed since Defendants received this written notice of intent to sue.

### C. THE GUNNISON’S PRAIRIE DOG LISTING PETITION

37. Gunnison’s Prairie Dog is one of five species of prairie dog found in North America. Roughly one foot in length and golden brown in color, they are social, colonial animals that have

historically inhabited high desert and mountainous grasslands in northwestern and north-central New Mexico, northern Arizona, southwestern and south central Colorado, and the extreme southeastern part of Utah. Over the past century, however, Gunnison's Prairie Dogs have disappeared from more than 90% of their former range, and where they remain today they are significantly fewer in number.

38. As with other members of the prairie dog genus, Gunnison's Prairie Dogs are a keystone species. Gunnison's Prairie Dogs serve as prey for a variety of other animals. Further, their large and complex burrow networks create refugia for a multitude of associated mammals, birds, herptiles, and insects, and their clipping, grazing, and other activities above ground alter soil and plant characteristics to create unique habitat for other species.

39. Research indicates that nine species of birds and mammals are dependent upon prairie dogs for their own survival. Research also demonstrates that about 140 wildlife species are associated, to varying degrees, with prairie dogs and their colonies.

40. Aside from the important role that Gunnison's Prairie Dogs play in the ecosystem where they are found, they have also drawn scientific attention by the sophistication of their communication system. Researchers have concluded that this communication system is the most complex of any non-human animal ever studied. Testing of Gunnison Prairie Dogs' alarm calls indicates that these animals appear to use a primitive grammar, employing noun, verb, and adjective-like elements.

41. Despite these beneficial qualities, Gunnison's Prairie Dogs are increasingly beset by a variety of human-induced threats to their continued existence. As a result they have disappeared from four of the eight Arizona counties in which they were historically found and have also lost substantial acreage from their range in New Mexico and Colorado. Moreover, where Gunnison's

Prairie Dogs remain, their “towns” are often small and widely scattered. Few large complexes remain in existence.

42. Four main factors are responsible for both the decline in the Gunnison’s Prairie Dog’s range and population from historic levels and the future risk of continued decline leading to extinction: shooting, poisoning, sylvatic plague, and habitat destruction.

43. Recreational shooting of Gunnison’s Prairie Dogs occurs throughout their range, sometimes in the form of organized prairie dog shooting contests. Once shot, the Gunnison’s Prairie Dogs are simply left to rot. They are not taken as food or put to any useful purpose.

State governments have done little to regulate the shooting of Gunnison’s Prairie Dogs.

Although Arizona and Utah have established short seasonal closures for prairie dog shooting, exemptions from these closures are available. Similarly, while Colorado has restricted the number of prairie dogs that may be taken in organized shooting contests, there is no bag limit for non-contest shooting. There are no seasonal closures or bag limit restrictions on prairie dog shooting in New Mexico.

44. Millions of acres of Gunnison’s Prairie Dogs habitat have been poisoned in an attempt to eradicate the species based on faulty early 1900s science that claimed significant competition between Gunnison’s Prairie Dogs and livestock for forage. Much of this poisoning has been paid for and continues to be paid for with federal tax dollars. Facilitated by state and federal government agencies, poisoning of Gunnison’s Prairie Dog colonies continues to occur, despite the fact that losses in the species’ range resulting from past poisoning efforts have not been recovered.

45. Introduced to this country from Japan around the turn of the last century, sylvatic plague first reached the region occupied by Gunnison’s Prairie Dogs in 1932. Although Gunnison’s

Prairie Dogs themselves do not carry the plague, their complete lack of natural immunity places mortality rates at 99 – 100%. Sylvatic plague epidemics have continued to recur in cycles throughout the last several decades, and the disease currently remains a threat throughout the Gunnison's Prairie Dog's entire range.

46. Pressures on the Gunnison's Prairie Dogs' habitat harm remaining populations.

Conversion of Gunnison's Prairie Dog habitat through residential, commercial, and agricultural development results in the destruction of prairie dog towns and isolates surviving colonies.

Some municipalities have required the relocation of Gunnison's Prairie Dogs from lands undergoing development, but even in these areas, relocation programs have been required in less than half of the cases where urban Gunnison's Prairie Dog habitat is developed. Meanwhile, oil and gas development and over-grazing of livestock lead to the degradation of still more habitat, leaving those areas unable to support Gunnison's Prairie Dog populations. Forty percent of potential habitat is located on federal or state government-owned land, much of which is employed for livestock grazing or oil and gas development. Livestock grazing can foster the proliferation of non-native weeds which replace the native plants that make up the Gunnison's Prairie Dog's food supply. Similarly, the pace and scale of oil and gas development is driving Gunnison's Prairie Dogs from their natural habitat. Between 2002 and early 2004, the Bureau of Land Management offered oil and gas leases on over 307,000 acres within the Gunnison's Prairie Dog's range.

47. While sylvatic plague alone represents a significant threat to the Gunnison's Prairie Dog's continued existence, the plague in concert with habitat destruction, shooting, and poisoning has the potential to entirely eliminate the increasingly small and scattered populations that remain in existence.



48. Plaintiffs FOREST GUARDIANS, CENTER FOR BIOLOGICAL DIVERSITY and CENTER FOR NATIVE ECOSYSTEMS, among others, submitted a petition to list the Gunnison's Prairie Dog as endangered or threatened on February 23, 2004. Defendants received this petition to list the Gunnison's Prairie Dog on March 1, 2004.

49. By letter dated July 29, 2004, Plaintiffs FOREST GUARDIANS and CENTER FOR NATIVE ECOSYSTEMS provided Defendants with written notice of their intent to sue for Defendants' failure to issue a substantial information finding on the Gunnison's Prairie Dog listing petition, a violation of section 4 of the ESA. See 16 U.S.C. § 1540(g)(2)(C). More than sixty days have passed since Defendants received this written notice of intent to sue. On October 14, 2004 the FWS sent a letter to Dr. Nicole Rosmarino of Forest Guardians indicating that it is likely that the FWS will not initiate a "substantial information" review on the Gunnison's Prairie Dog petition in FY 2005 without a court order.

#### D. THE BLACK HILLS MOUNTAINSNAIL LISTING PETITION

50. The Black Hills mountainsnail is a rare and critically imperiled land snail species that is found only in the forests of the Black Hills, an isolated mountain range located in western South Dakota and northeastern Wyoming. As an isolated mountain ecosystem, the Black Hills are especially vulnerable to environmental degradation. Pressured by more than a century of logging, livestock grazing, mining, and road construction, the Black Hills ecosystem is on the verge of collapse. However, little has been done to stem the tide of ecological damage and many species unique to the region face the possibility of extinction.

51. White in color with reddish-brown markings, the Black Hills mountainsnail, also known

as the Cooper's rocky mountainsnail, is the largest species of mountainsnail found in the Black Hills. Though sometimes incorrectly identified as a subspecies of *Oreohelix strigosa*, the Black Hills mountainsnail is in fact a distinct species (*Oreohelix cooperi*). It is morphologically and/or anatomically distinct from other *Oreohelix* snails.

52. The Black Hills mountainsnail plays an integral part in the Black Hills ecosystem. Land snails, such as the Black Hills mountainsnail, contribute substantially to nutrient recycling by breaking down plant litter and animal waste. In turn, they serve as prey for a variety of small mammals, reptiles, amphibians, birds, and insects.

53. The specialized habitat requirements of the Black Hills mountainsnail make it an excellent indicator of general ecosystem health. The Black Hills mountainsnail requires moist soils with high calcium levels. It is thus most often found in high-quality forested riparian habitat, and is highly sensitive to reductions in the quality of this habitat. Moreover, the Black Hills mountainsnail is physically incapable of migrating; although members of the species live from 2-6 years, they typically journey no more than twenty (20) feet from their place of birth during their lifetime. This combination of slow movement and vulnerability to habitat disturbances means that the Black Hills mountainsnail provides an ideal window into the overall health of the Black Hills ecosystem. Determining the health of Black Hills mountainsnail colonies thus aids in assessing ecosystem restoration projects, gauging the status and health of other species, and measuring the effects of land management activities.

54. The Black Hills mountainsnail's range and habitat have undergone significant declines in the past century. Today, only thirty-two (32) Black Hills mountainsnail populations are known to exist. Moreover, the Black Hills mountainsnail is not found in abundance at the majority of these colonies. On the contrary, at eighteen (18) of these colonies the Black Hills mountainsnail

was found to be rare or uncommon.

55. Of the thirty-two (32) Black Hills mountainsnail populations known to exist, twenty (20) are located on land managed by the United States Forest Service (the "Forest Service"), while three additional colonies are found on land managed by other government entities.

56. Extensive habitat destruction and degradation in the Black Hills of South Dakota and Wyoming has already caused a corresponding decline in the range, habitat, and population of the Black Hills mountainsnail, but excessive domestic livestock grazing, logging, road construction, herbicide and pesticide application, and mining continue to threaten the colonies that remain.

57. Domestic livestock grazing results in the compaction and trampling of Black Hills mountainsnail habitat, and the accompanying deposits of manure and urine further alter soil characteristics, destroying the delicate relationship between the Black Hills mountainsnail and its environment. Even so, domestic livestock grazing continues to occur in Black Hills mountainsnail habitat throughout the Black Hills.

58. Logging removes tree cover, which allows additional sunlight to reach the ground. This sunlight reduces the moisture of the soil, leaving it unable to support a Black Hills mountainsnail population. Additionally, logging eliminates Black Hills mountainsnail shelter, hibernation, and egg-laying sites. Throughout the 1990's, the Forest Service authorized logging projects despite impacts to Black Hills mountainsnail colonies, and several proposed timber sales threaten to further destroy, modify, and/or curtail the range and habitat of remaining Black Hills mountainsnail populations.

59. Aside from direct habitat destruction through ground disturbance, road-building also impacts Black Hills mountainsnail populations by increasing soil sunlight exposure and fostering an increase in traffic that leads to the introduction of non-native plants and animals to the Black

Hills mountainsnail's habitat. In spite of these impacts, the Forest Service is planning the construction of many miles of new roads that may negatively affect Black Hills mountainsnail habitat.

60. Herbicides are typically toxic to land snails such as the Black Hills mountainsnail, and may also remove vegetative cover essential to the Black Hills mountainsnail's habitat.

Meanwhile, pesticides may kill Black Hills mountainsnails through either direct contact or ingestion. Thus, past and present application of herbicides and pesticides within the Black Hills is an important factor in the precarious state of Black Hills mountainsnail colonies.

61. Mining harms Black Hills mountainsnails both through direct ground disturbance and by leading to the production of mine wastes and effluvia that often contain acidic materials and heavy metals, most of which are extremely toxic to the Black Hills mountainsnail. Mining has occurred extensively within the range of the Black Hills mountainsnail, and mining activity on the Black Hills continues to threaten the Black Hills mountainsnail and its habitat.

62. As colonies of Black Hills mountainsnail have been reduced in size and extent, and have become isolated due in part to habitat destruction and degradation, disease, predation, and naturally occurring events such as fires and floods now pose a greater risk to the survival of the species.

63. Plaintiffs BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR NATIVE ECOSYSTEMS and JEREMY NICHOLS, among others, submitted a petition to list the Black Hills mountainsnail as endangered or threatened on September 24, 2003. Both Defendants received this petition to list the mountainsnail by September 30, 2003, more than one year ago.

64. By letter dated January 13, 2004, Plaintiffs BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR NATIVE ECOSYSTEMS and JEREMY NICHOLS, among others,

provided Defendants with written notice of their intent to sue for Defendants' failure to issue a substantial information finding on the Black Hills Mountainsnail listing petition, a violation of section 4 of the ESA. See 16 U.S.C. § 1540(g)(2)(C). More than sixty (60) days have passed since Defendants received this written notice of intent to sue.

#### E. THE UINTA MOUNTAINSNAIL LISTING PETITION

65. The rarest unprotected snail species in the country, the Uinta mountainsnail is a land snail species found in northeastern Utah. Only one population of Uinta mountainsnail is known to exist, and this population inhabits an area less than one acre in size. The lone Uinta mountainsnail colony is found on federal property, along Hominy Creek in the Ashley National Forest.

66. Existing only in a small and isolated population, the Uinta mountainsnail is extremely vulnerable to local, small-scale weather and other natural events; a single fire, severe storm, unusually hard winter, or prolonged drought in this one habitat could completely eliminate the species.

67. The occurrence of livestock grazing in and near the Uinta mountainsnail's habitat could also eliminate the species. Because the lone Uinta mountainsnail population inhabits a site that is steep, dry, and highly erodible, trampling and grazing by cattle could destroy the habitat of the Uinta mountainsnail, as well as the snails themselves. Grazing in this area could also remove plant cover, adding to the destabilization of the slope, altering the immediate habitat, and removing important food sources.

68. Timber harvesting is another potential threat to the continued existence of the Uinta

mountainsnail. Even though the particular site occupied by the Uinta mountainsnail is not wooded, the surrounding area is. Thus, a single instance of contamination or sedimentation from timber cutting or road construction operations could extinguish the entire species.

69. To assist the Uinta mountainsnail in overcoming the threats to its habitat, Plaintiff UTAH ENVIRONMENTAL CONGRESS submitted a petition to list the Uinta mountainsnail as endangered or threatened on August 21, 2001. Defendants received this petition to list the Uinta mountainsnail on August 29, 2001, more than one year ago.

70. By letter dated July 13, 2004, Plaintiffs BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR NATIVE ECOSYSTEMS, and UTAH ENVIRONMENTAL CONGRESS provided Defendants with written notice of their intent to sue for Defendants' failure to issue a substantial information finding on the Uinta mountainsnail listing petition, a violation of section 4 of the ESA. See 16 U.S.C. § 1540(g)(2)(C). More than sixty (60) days have passed since Defendants received this written notice of intent to sue.

## V. CLAIMS

### A. CLAIMS AS TO THE DAKOTA SKIPPER LISTING PETITION

#### FIRST CLAIM FOR RELIEF (ESA Section 4(b)(3)(A))

71. Each allegation set forth in the Complaint is incorporated herein by reference.

72. It has been more than a year since Defendants received the petition to list the Dakota Skipper. However, Defendants have failed to make a substantial information finding on the Dakota Skipper listing petition.

73. Therefore, Defendants are in violation of their mandatory duty under section 4(b)(3)(A)

of the ESA by failing to make this substantial information finding. 16 U.S.C. § 1533(b)(3)(A);

(ALTERNATIVE) SECOND CLAIM FOR RELIEF  
(APA UNREASONABLE DELAY)

74. Each allegation set forth in the Complaint is incorporated herein by reference.

75. Section 4 of the ESA establishes a time frame within which Congress intended agencies to respond to petitions to list species.

76. Numerous factors continue to threaten the remaining Dakota Skippers, which seriously harm human welfare interests in the conservation of native species.

77. Defendants have unreasonably delayed compliance with their mandatory duty by failing to make a substantial information finding, which is part of a rule making process, as to the Dakota Skipper listing petition. See 5 U.S.C. § 706(1).

(ALTERNATIVE) THIRD CLAIM FOR RELIEF  
(ESA Section 4(b)(3)(B)(iii))

78. Each allegation set forth in the Complaint is incorporated herein by reference.

79. The description of the current status of the Dakota Skipper that FWS provided as part of its Candidate Notices of Review does not meet the standard established by section 4(b)(3)(B)(iii) of the ESA for 12-month warranted but precluded findings.

(ALTERNATIVE) FOURTH CLAIM FOR RELIEF  
(APA ARBITRARY AND CAPRICIOUS)

80. Each allegation set forth in the Complaint is incorporated herein by reference.

81. The description of the current status of the Dakota Skipper that FWS provided as part of its Candidate Notices of Review does not provide an adequate basis for judicial review, and as a 12-month warranted but precluded finding it is thus arbitrary and capricious. See 5 U.S.C. § 706(2)(A).

## B. CLAIMS AS TO THE GUNNISON'S PRAIRIE DOG LISTING PETITION

### FIFTH CLAIM FOR RELIEF (ESA Section 4(b)(3)(A))

82. Each allegation set forth in the Complaint is incorporated herein by reference.

83. To date, Defendants have failed to make a substantial information finding as to the Gunnison's Prairie Dog listing petition.

84. Defendants' failure to make this finding is consistent with, and the result of, Defendants' pattern and practice of failing to make such findings for Plaintiffs' and others' listing petitions unless ordered to do so by a court.

85. Upon information and belief, FWS will not issue a substantial information finding on the Gunnison's Prairie Dog listing petition even after one full year will have passed since Defendants received this petition.

86. Defendants are in violation of their mandatory duty under section 4(b)(3)(A) of the ESA by failing to make this substantial information finding. 16 U.S.C. § 1533(b)(3)(A);

### (ALTERNATIVE) SIXTH CLAIM FOR RELIEF (APA UNREASONABLE DELAY)

87. Each allegation set forth in the Complaint is incorporated herein by reference.



88. Section 4 of the ESA establishes a time frame within which Congress intended agencies to respond to petitions to list species.

89. FWS has engaged and continues to engage in a pattern and practice of not issuing substantial information findings under ESA § 4(b)(3)(A) for Plaintiffs' and others' ESA listing petitions until ordered to do so by a court. FWS has illegally applied this pattern and practice to the Gunnison's Prairie Dog listing petition.

90. Numerous factors continue to threaten the remaining Gunnison's Prairie Dogs. Further decline or extinction of the Gunnison's Prairie Dog would have an adverse ripple effect throughout their ecosystems.

91. Defendants have unreasonably delayed compliance with their mandatory duty by failing to make a substantial information finding, which is part of a rule making process, as to the Gunnison's Prairie Dog listing petition. See 5 U.S.C. § 706(1).

### C. CLAIMS AS TO THE BLACK HILLS MOUNTAINSNAIL LISTING PETITION

#### SEVENTH CLAIM FOR RELIEF (ESA Section 4(b)(3)(A))

92. Each allegation set forth in the Complaint is incorporated herein by reference.

93. It has been more than a year since Defendants received the petition to list the Black Hills mountainsnail. However, Defendants have failed to make a substantial information finding on the Black Hills mountainsnail listing petition.

94. Therefore, Defendants are in violation of their mandatory duty under section 4(b)(3)(A) of the ESA by failing to make this substantial information finding. 16 U.S.C. § 1533(b)(3)(A);

(ALTERNATIVE) EIGHTH CLAIM FOR RELIEF  
(APA UNREASONABLE DELAY)

95. Each allegation set forth in the Complaint is incorporated herein by reference.
96. Section 4 of the ESA establishes a time frame within which Congress intended agencies to respond to petitions to list species.
97. Numerous factors continue to threaten the remaining Black Hills mountainsnails, which seriously harm human welfare interests in the conservation of native species.
98. Defendants have unreasonably delayed compliance with their mandatory duty by failing to make a substantial information finding, which is part of a rule making process, as to the Black Hills mountainsnail listing petition. See 5 U.S.C. § 706(1).

D. CLAIMS AS TO THE UINTA MOUNTAINSNAIL LISTING PETITION

NINTH CLAIM FOR RELIEF  
(ESA Section 4(b)(3)(A))

99. Each allegation set forth in the Complaint is incorporated herein by reference.
100. It has been more than a year since Defendants received the petition to list the Uinta mountainsnail. However, Defendants have failed to make a substantial information finding on the Uinta mountainsnail listing petition.
101. Therefore, Defendants are in violation of their mandatory duty under section 4(b)(3)(A) of the ESA by failing to make this substantial information finding. 16 U.S.C. § 1533(b)(3)(A);

(ALTERNATIVE) TENTH CLAIM FOR RELIEF  
(APA UNREASONABLE DELAY)

102. Each allegation set forth in the Complaint is incorporated herein by reference.

103. Section 4 of the ESA establishes a time frame within which Congress intended agencies to respond to petitions to list species.

104. Numerous factors continue to threaten the remaining Uinta mountainsnails, which seriously harm human welfare interests in the conservation of native species.

105. Defendants have unreasonably delayed compliance with their mandatory duty by failing to make a substantial information finding, which is part of a rule making process, as to the Uinta mountainsnail listing petition. See 5 U.S.C. § 706(1).

E. PATTERN AND PRACTICE CLAIMS

ELEVENTH CLAIM FOR RELIEF  
(ESA Section 4(b)(3)(A))

106. Each allegation set forth in the Complaint is incorporated herein by reference.

107. It has been more than a year since Defendants received the petition to list the Dakota Skipper, Black Hills Mountainsnail and Uita Mountainsnail. However, Defendants have failed to make a substantial information finding on the Dakota Skipper, Black Hills Mountainsnail and Uita Mountainsnail listing petition. Moreover, upon information and belief, it will be more than one year before the Defendants make a substantial information finding for the Gunnison's Prairie Dog.

108. Defendants' failure to make these substantial information finding is consistent with, and the result of, Defendants' pattern and practice of failing to make such findings for petitioners to

list species for Plaintiffs' and others' listing petitions unless ordered to do so by a court.

109. Defendants are in violation of their mandatory duty under section 4(b)(3)(A) of the ESA by failing to make these substantial information findings. 16 U.S.C. § 1533(b)(3)(A).

(ALTERNATIVE) TWELFTH CLAIM FOR RELIEF  
(APA UNREASONABLE DELAY)

110. Each allegation set forth in the Complaint is incorporated herein by reference.

111. Section 4 of the ESA establishes a time frame within which Congress intended agencies to respond to petitions to list species.

112. FWS has engaged and continues to engage in a pattern and practice of not issuing substantial information findings under ESA § 4(b)(3)(A) for Plaintiffs' and others' ESA listing petitions until ordered to do so by a court. FWS has illegally applied this pattern and practice to the Dakota Skipper, Gunnison's Prairie Dog, Black Hills Mountainsnail and Uta Mountainsnail listing petitions.

113. Numerous factors continue to threaten the remaining Dakota Skippers, Gunnison's Prairie Dogs, Black Hills Mountainsnails, and Uta Mountainsnails, which seriously harm human welfare interests in the conservation of native species.

114. Defendants have unreasonably delayed agency action by failing to make a substantial information finding, which is part of a rule making process, as to the Dakota Skipper, Gunnison's Prairie Dog, Black Hills Mountainsnail, and Uta Mountainsnail listing petition. See 5 U.S.C. § 706(1).

## VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing the following relief:

- A. Declare that Defendants are in violation of the ESA by failing to make a mandatory substantial information finding as to the Dakota Skipper listing petition, the Gunnison's Prairie Dog listing petition, the Black Hills mountainsnail listing petition, and the Uinta mountainsnail listing petition;
- B. Declare that Defendants are unreasonably delaying agency action by failing to make a mandatory substantial information finding as to the Dakota Skipper listing petition, the Gunnison's Prairie Dog listing petition, the Black Hills mountainsnail listing petition, and the Uinta mountainsnail listing petition;
- C. Declare that Defendants have engaged in a pattern and practice of ignoring statutory deadlines with respect to Plaintiffs' listing petitions until ordered to do so by a court;
- D. If the Court determines that the Candidate Notice of Review constitutes a valid substantial information finding as to the Dakota Skipper listing petition, declare that Defendants violated the ESA and the Administrative Procedure Act by failing to provide a description and evaluation of their findings with respect to the Dakota Skipper listing petition sufficient to justify a 12-month warranted but precluded finding as to the Dakota Skipper listing petition;
- E. Order Defendants through an injunction to make substantial information findings as to the Dakota Skipper listing petition, the Gunnison's Prairie Dog listing petition, the Black Hills mountainsnail listing petition, and the Uinta mountainsnail listing petition by a date certain; or if the Court determines that the Candidate Notice of Review constitutes a valid substantial

information finding as to the Dakota Skipper listing petition, order Defendants through an injunction to make a 12-month finding as to the Dakota Skipper listing petition and substantial information findings as to the Gunnison's Prairie Dog listing petition, the Black Hills mountainsnail listing petition, and the Uinta mountainsnail listing petition by a date certain;

F. Order Defendants to cease their pattern and practice of ignoring the statutory deadlines triggered by Plaintiffs' listing petitions;

G. Award Plaintiffs' costs, including reasonable attorneys' and expert witness fees; and

H. Provide such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s

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Counsel for Plaintiffs

Dated: December 7, 2004

CERTIFICATE OF SERVICE

I hereby certified that I had the above First Amended Complaint served by first class U.S.

mail on December 7, 2004:

LISA RUSSELL, Assistant Section Chief  
U.S. Department of Justice  
Environment & Natural Resources Division  
Wildlife and Marine Resources Section  
P.O. Box. 7369  
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/s  
Robert Ukeiley

